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## THE RIGHT OF ASYLUM IN THE LEGATIONS OF THE UNITED STATES IN CENTRAL AND SOUTH AMERICA.

THE right of asylum finds its origin, basis, and excuse in a passion coeval with human nature,—the desire for vengeance. From the holy city of refuge of King David's time to the Hidalgo case in Ecuador, the underlying principle has been the same,—not a matter of legal right, but the conflict on the one side of a frenzied thirst for revenge, and on the other of the cooler, higher counsel of humanity and self-control. Nations have attempted to call in certain doctrines of recognized international law in justification, or to engraft, by means of a fiction or by figures of speech, excrescences upon the body of international jurisprudence; but it will be found that the so-called "right" is the product of circumstances, and that the recurrence of conditions resembling those wherein it had its birth is to-day the cause of its revival; in other words, that the "right of asylum" is no right at all, but merely a privilege granted or claimed where its use finds sanction in the necessities of a mutable condition of society.

In those countries in which the government is stable and enduring and the local law dominant, the privilege is seldom called in question, but has fallen into "innocuous desuetude," simply because there has been no necessity for its exercise, until to-day it is doubtful if in one of the greater nations of the world its existence would be either claimed or conceded. However, in those states comprehended under the term "Spanish-American countries," the conditions favoring its use have so frequently occurred that it has continually been the subject of diplomatic correspondence; there has seemed something inherent in the Spanish character demanding the interposition of a restraining hand at certain recurrent crises in the political lives of those countries. Thus it is that almost every instance of the attempted exercise of the privilege by an American minister has occurred in one of the so-called republics of Central and South America. Accounts of at least thirty-five instances<sup>1</sup> upon the Western Hemisphere wherein the question of

<sup>1</sup> (1.) 1851, Chili. (2.) 1853, Peru. (3.) 1854, Peru. (4.) 1855, Nicaragua. (5.) 1859, Chili. (6.) 1865, Hayti. (7.) 1865, Peru. (8.) 1867, Peru. (9.) 1868, Paraguay. (10.) 1868, Hayti. (11.) 1869, Hayti. (12.) 1870, Guatemala. (13.) 1871,

asylum has been opened appear in our Foreign Reports, — 13 in Hayti, 4 each in Bolivia, Chili, and Peru, 2 each in Ecuador, Guatemala, and Nicaragua, and 1 each in Colombia, Mexico, Salvador, and Paraguay, — the earliest of these cases being that in Chili in 1851, and the latest in Ecuador under Mr. Olney. Of all these, the more important instances have been that involving the romantic and spectacular career of General Boisrond Canal, in Hayti, in 1875, wherein the use of asylum was deprecated and disavowed as far as seemed consistent with the dignity of our flag, and that extended use to which the privilege was put by Minister Egan, in Chili, in 1891, in which, so far as may be gleaned from official correspondence, the position of our representative was supported by his government.

It may be most profitable to take up these matters in chronological order, to see if our government has throughout maintained a consistent attitude, and afterward to discuss the foundations of the various claims and the principles involved.

#### HISTORICAL.

Prior to the date with which this summary begins, several detached instances of the exercise of the right of asylum in Central and South America are to be found, and, in the instructions of Mr. Livingston, Mr. Calhoun, Mr. Buchanan, and Mr. Clayton, secretaries of state, the general tenor prevails that the privileges are "more liberally construed in the Mohammedan states and in South America than in the leading European states, but they should be in all cases guarded." Mr. Calhoun once states, "They must be indulgently construed." 1. In 1851, Mr. Webster took a position considerably different from that of his predecessors, stating that although acquiescence by the government of Chili on former occasions might preclude that government from objecting to the continued granting of such hospitality, yet, "if it makes objection . . . our minister should advise the particular political refugees that shelter can no longer be afforded," — a sort of imperfect estoppel. 2. In 1853, Mr. Marcy, Secretary of State, denied the right of consuls to "afford protection to those who have rendered themselves obnox-

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Salvador. (14.) 1872, Hayti. (15.) 1873, Hayti. (16.) 1875, Bolivia, Jan. 19. (17.) 1875, Bolivia, Feb. 20. (18.) 1875, Bolivia, March 20. (19.) 1875, Hayti, May 1. (20.) 1875, Bolivia, Oct. 5. (21.) 1877, Mexico. (22.) 1878, Hayti. (23.) 1879, Hayti. (24.) 1885, Colombia, Feb. 23. (25.) 1885, Hayti, Nov. 7. (26.) 1888, Hayti. (27.) 1890, Hayti. (28.) 1890, Guatemala. (29.) 1891, Chili. (30.) 1892, Hayti. (31.) 1893, Nicaragua. (32.) 1893, Chili, April 10. (33.) 1895, Ecuador. (34.) 1896, Hayti, Feb. 3. (35.) 1896, Ecuador, March 12.

ious to the authority of the government under which they dwell." And he refused to see any insult to our flag in the arrest of the refugees within the consulate. "The flag had been unwarrantably used." (Peru.) 3. In 1854, on a demand that all refugees should leave the republic, our minister to Peru insisted that foreign legations were "entirely extraterritorial," and that the right in question had been officially recognized and constantly respected by all the governments, since the independence of Peru, within its borders. 4. In 1855, Mr. Marcy repeated his instructions of 1853 almost verbatim in a case arising in an American consulate in Nicaragua. 5. In 1859, the United States consul in Valparaiso, Chili, undertook to protect certain political refugees. His house was attacked by soldiers, the refugees taken, and his "exequatur" recalled. Secretary Cass instructed our minister resident, "The existence of a usage of asylum such as you mention would go far to induce this government to require the restoration of Mr. Trevitt's exequatur." It seems, however, that the exequatur was not restored. The violence of the entrance effected seems to have been uppermost in Mr. Cass's mind. 6. In 1865, our minister to Hayti was instructed that consuls have no right to harbor political refugees, and there could be no cause of complaint if refugees so harbored were to be taken from the consular abode. 7. In 1865, in Peru, occurred one of the most notable cases. In May, General Canseco took refuge in the American legation, where our minister refused to surrender him, a position taken in common with the other ministers resident. He soon after escaped, and was instrumental in the overthrow of the existing government when members of the defeated party in turn sought refuge. Mr. Hovey, a new minister, had by this time (December 20) succeeded Mr. Robinson, and refused to grant asylum, stating in contradiction to the French minister, who said, "Its benefits amply compensate for a fault inspired by the sentiment of humanity," that "The houses of foreign ministers have become little less than the abode of criminals who flee from the vengeance of the law. . . . The practice leads to very evil consequences." His position was expressly sanctioned at Washington. 8. In 1867, in a conference of the various ministers to Peru, Mr. Hovey endeavored to have Peru recognized as a "Christian nation," "the law of nations as relating to the question of asylum to be the same as practised in the United States, and the Christian nations of Europe." He was strenuous in his endeavor to abolish the right, but the other ministers were united against him. But the Peruvian government finally declared that it "renounced its

right of her legations in other South American states to the said privileges, and denies the same to the legations of such states in Peru." This seems to have effectually cleared the atmosphere in this country, for there is no subsequent record of Peru upon the books of the United States.

9. In 1868, Washburn, minister to Paraguay, gave shelter to a number of political refugees, including two American citizens. A list of them having been furnished to the government, they were demanded, and the Americans seized as they were accompanying Mr. Washburn out of the country. They were subsequently released upon demand of Admiral Davis, backed up by an American man-of-war. No complaint was made by Secretary Seward as to the refusal of the Paraguayan government to permit the continuance of the practice, but in his note of January 14th he said: "Your intention to afford asylum in the legation to those who may resort to it, save notorious criminals, as far as it can be done without compromising your neutral character, is approved." 10. At about the same time, May, 1868, Mr. Seward was instructing Mr. Hollister, minister to Hayti: "We are prepared to accept your opinion that it is no longer expedient to practice the right of asylum in the Haytien republic. Nevertheless, we should not be willing to relinquish the right abruptly . . . nor any sooner, nor in any greater degree, than it is renounced by the legations of the other important neutral powers . . . the exercise of the right should be attended with delicacy and no display of arrogance." 11. In the following year, Mr. Secretary Fish, who gave our policy a strong impetus in its present direction, began to take a more radical position. He says to Mr. Bassett at Hayti: "While you are not required to expel . . . you will give them to understand that your government cannot assume any responsibility for them, and especially cannot sanction any resistance by you to their arrest by the authorities for the time being." 12. In 1870, Mr. Hudson, minister to Guatemala, refused to give refuge to one Granadas, at that time eluding arrest for rebellion, but upon the overthrow of the government and the rise of Granadas, he extended the protection of the legation to all parties; whereupon the United States government gave answer: "Your efforts to protect life and property meet with the approval of this department." 13. In 1871, Duenas, the deposed president of Salvador, took refuge at the American legation, whence he was later surrendered upon the guarantee that his life would be spared, and with his own assent. Mr. Fish regarded the assent as a necessary element in the case,

apparently thus claiming the right to retain the refugee. He subsequently called upon the government to respect its promise of immunity. 14. In 1872, American consuls in Hayti protected refugees without comment from the government, under a "wise discretion and avoidance of misunderstandings." 15. In 1873, Mr. Fish regarded the invasion of the consular office at St. Marc an international discourtesy requiring an emphatic protest and a demand for decided redress, but did not make any claim on account of the fugitives arrested. The year 1875 was prolific of trouble for our ministers in Bolivia and Hayti, in both of which countries mushroom revolutions and counter-revolutions sprung up. In Bolivia four different instances arose (cases 16, 17, 18, 20), while in Hayti our legation was in a state of siege from May 1 to October 5 over the case of General Boisrond Canal, the "pièce de resistance," under this head, of American diplomacy. 16. Minister Reynolds, at La Paz, on January 19, congratulated himself that "no harm has come to any one that asked asylum in this legation." 17. On February 20, he refused asylum to those "connected with the late mutiny, knowing well its character, wherein many murders were permitted in cold blood," but allowed two political refugees to remain who filed statements that they had not been in arms. He also assured the Bolivian government that "under no circumstances could I permit an unfriendly or hostile act toward the constitutional government of Bolivia by any one under the protection of the flag." 18. Upon March 20, he refused asylum to further insurgents on the ground that "they were criminals to be tried for incendiarism and murder in the attack upon the imperial palace," while, October 5 (case 20), he refused General Suarez, who claimed to be a political refugee, not "knowing for what he was sought to be arrested or charged," which position was approved at Washington.

19. In Hayti, May 1st, there was a scene of wild disorder. Illegal arrests had been ordered for three leaders of the opposition party; they, fearing that the arrests were made as cover for assassination, resisted. Two were killed, but General Boisrond Canal fought his way with two relatives to the country house of Minister Bassett, where were three other Haytien gentlemen spending Sunday with the minister. All of the refugees in the legation were demanded, martial law was proclaimed, the whole town was in an uproar, 1500 soldiers were posted around the premises, and threats of incendiarism were made. The minister refused to give a list of the fugitives, asserting that this was a courtesy given in the past

only to expedite the embarkation of refugees, and not to furnish ready identification for a trumped-up indictment. The Haytien government insisted that the refugees were guilty of criminal acts, while Minister Bassett was equally positive (in which opinion the diplomatic corps agreed) that the fugitives were only political offenders, and the arrest was intended as a *coup d'état*. Ingress and egress at the minister's home was blocked, and the continued noise made by the armed forces rendered rest impossible. While Mr. Bassett protested against this outrageous treatment, the Haytien government took an appeal through their minister at Washington to Secretary Fish, and upon September 27th, after a statement by Secretary Fish that the continuance of the indignities would be considered an unfriendly act justifying the visit of a warship, it was agreed that the refugees should be embarked for Jamaica upon surrender to the Haytien officials. During the course of correspondence the following extracts are of importance :

"I shall receive and protect, as I judge best, in my legation, any and every person who may apply." (Stuart, British Minister.) "I do not see how we can ignore it in the face of the practice which has existed here for seventy years. The right of asylum has never been renounced by this government, and it practically has refused to assent to its discontinuance. . . . The Haytien plenipotentiary would not agree to having the exercise of this right taken away from even our consulates in the inferior ports." (Minister Bassett to Secretary Fish.) "These men are considered as being on the territory of the United States and under its protection. I guarantee that they will in no way affect public order while they remain here." (Minister Bassett to Mr. Excellent of Hayti.) "Since the custom is tolerated by the other powers . . . we are not disposed to place the representatives of the United States in an invidious position by positively forbidding them to continue the practice. . . . You have repeatedly been instructed that such a practice has no basis in public law, and is believed to be contrary to sound policy. The course of other states in receiving political refugees is not sufficient to sanction a similar step for us. . . . However, it is not expedient that the refugees should be given up. . . . No matter what our disposition to receive reasons to palliate or justify, it is still in the power of the Haytien government to refuse to be satisfied. . . . It is to be regretted that you allowed your partialities and humanity to overcome that discretion which you were expected to exercise." (Secretary Fish to Minister Bassett.) "The practice has been to tolerate the right in countries of Spanish origin . . . the practice has never addressed itself to the full favor of the government. . . . This government is not by itself and independently disposed to absolutely prohibit its diplomatic representatives from grant-

ing asylum in every case. They may exercise the prerogative under their own responsibility. . . . We would prefer, therefore, not to formally assent to the 'propositions you make for its abolishment' without ascertaining the views of other governments." (Secretary Fish to Mr. Preston [Hayti].)

21. In 1877, General Arce took refuge in an American consulate in Mazatlan, Mexico. Notwithstanding our consul announced that he was under his protection, the refugee was forcibly removed. Minister Foster called attention to our discouragement of asylum, but claimed that the act was in bad faith after the assurance by the Mexican government of its respect of the protection. The matter does not further appear in the reports. 22. In 1878, Minister Langston, after giving the names of certain refugees rebelling against the Canal administration, secured their embarkation with the consent of the Haytien government. The diplomatic corps had agreed not to deliver up any one desiring refuge. 23. In the following year in the revolution of that season, Boisrond Canal, who had, subsequently to his asylum in 1875, returned and been chosen President, abdicated and claimed again the right of asylum, this time upon a British war vessel. At this time Secretary Evarts thus instructed Langston: "The practice has become so deeply established as to be practically recognized by whatever government may be in power, even to respecting the premises of a consulate, as well as a legation. This government does not sanction the usage, and enjoins . . . the avoidance of all pretexts for its exercise; while indisposed from obvious motives of common humanity to direct its agents to deny temporary shelter to any unfortunates threatened with mob violence, it will not countenance any attempt to knowingly harbor offenders against the laws." 24. Feb. 23, 1885, a controversy arose with the Colombian government over the protection afforded a wealthy citizen in the Argentine legation, and Minister Scruggs delivered himself of the following: "To make the exemption of the minister the more complete, the fiction of 'extritoriality' has been invented, whereby, though actually in a foreign country, he is supposed to remain within the territory of his own sovereign." This view was straightway disavowed by Secretary Bayard, who stated that the argument deduced from this phrase as a basis was utterly fallacious. 25. Nov. 7, 1885. Mr. Bayard to Mr. Thompson, minister to Hayti: "If, as a custom, the practice prevails, the exercise by Americans could not be deemed exceptional, and we should certainly expect such privileges as would be accorded other powers.



But we *claim* no right or privilege of asylum, but discountenance it." 26. The same statement was repeated in 1888 for the benefit of Consul Goutier, for whose instruction it was given in 1885, since he again stated that American consulates did not recognize the privilege of asylum; and (27) to Mr. Douglass in 1890, when the ubiquitous and pyrotechnic General Boisrond Canal, in the shift of fortunes, was again a compulsory guest, this time at the British legation, other persons having sought our shelter. 28. In 1890, in the Barrundia case, where Minister to Guatemala Mizner permitted the authorities to go aboard the U. S. vessel Acapulco after a political refugee, Secretary Blaine, on page 138, Foreign Relations Reports for 1890, urges that the exception to the general doctrine as to asylum has been maintained uniformly in South and Central America. "No nation could acquiesce in the sudden disregard or heed a demand for the peremptory abandonment of a privilege sanctioned by so general a usage." . . . "Even more powerfully do these causes operate to secure a refuge on foreign vessels." And, on page 135: "The most extreme writers hold it part of every nation's independence to grant asylum for those sought to be prosecuted for their political acts." Questions as to the right of asylum upon American ships also arose in 1891 in Salvador, 1892 in Venezuela, and in numerous other instances, but the principles involved are apart from the present subject.

29. On the 29th of August, 1891, upon the defeat of the government forces in Chili, Minister Egan threw open the doors of the American legation to some eighty refugees, among them the family of the defeated president, Balmaceda. Nine days previously he had sheltered some of the revolutionists against the opposition of the then government, which threatened to search the legation to discover them. Police were placed about the legation to arrest all persons entering or leaving the premises. This was on the 30th of August, and they were not withdrawn until January 12, 1892, when Mr. Egan succeeded in embarking those that remained with him, after an expense of some \$5000 for their entertainment, as he states in his dispatch of November 16th. The Chilian government charged that the legation was a hotbed of conspiracy against the state, an allegation which met with a strenuous denial from Mr. Egan, but the feeling which was worked up by the sheltering of the fugitives led to the outbreak against the "Americanos," crew of the Baltimore. Although ultimately giving the refugees permission to leave the country, the Chilian govern-

ment protested to the last that it could consistently grant no "safe conduct." Owing to the Baltimore incident of October 16th, these matters were completely swallowed up in the more trying complications, and little appears from the state department either confirming or negating Minister Egan's attitude in this respect. All that there is appears confirmatory of even Mr. Egan's advanced position:—

"The government of the United States is prepared to consider in a friendly spirit the question as to whether asylum has been properly given, . . . but it cannot allow to pass without firm protest the evidence of disrespect toward its minister. The right of asylum having been tacitly if not expressly allowed to other foreign legations, and having been exercised by our minister with the old government in the interest and for the safety of the adherents of the party now in power, the President cannot but regard the application of another rule as the manifestation of a most unfriendly spirit. The utmost precaution must be taken to prevent any abuse of the privilege of asylum." (Secretary Wharton to Minister Egan.) "I thank your excellency for the recognition which you concede to this legation of a principle which forms an integral part of the international practice of my country,—to grant asylum to the refugees of a political character who seek the protection which civilization and humanity counsel. . . . The refugees are virtually in foreign country [October 17th], and the decree of the minister of justice [subjecting the refugees to the judicial power of Chili] cannot destroy the usages and customs that are international, nor reach the persons who are in the legations and beyond its jurisdiction. . . . Therefore the government is at perfect liberty to concede the safe conducts [citing Chilean instructions at Lima in 1866, and the statement of the Chilean delegate at a congress at Montevideo in 1888], which is a necessary adjunct of the right of asylum. It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison." (Minister Egan to Señor Matta.)

Señor Matta contended that safe conducts could not be asked as a matter of right, but only as an act of "courtesy and the spontaneous will of the government," and that he could not grant the same after having indicted the refugees as offenders against the laws of his country. He further contended that, as the right of asylum extended only to the premises of the minister, the constant surveillance was justifiable when done upon the by-roads and streets leading to the legation.

A few minor cases complete this historical résumé:—

30. Jan. 7, 1892, two refugees in Hayti, after asking asylum of Minister Durham, sought refuge in the French legation; Mr. Blaine

said, "Practice discountenanced." 31. In 1893, Secretary Gresham cordially approved Minister Baker's refusal to shelter a Nicaraguan revolutionist. 32. April 10, 1893, Minister Egan became again embroiled in a difficulty in sheltering leaders of the revolutionary party, for whom the public prosecutor had demanded the sentence of death, but who had not been tried. The matter was referred in a friendly way to Washington. Ultimately, it was decided that there was no right of shelter, since, besides the political offenses charged, the refugees were under indictment for "sedition, riot, insurrection, and mutiny," prior to the political disturbance upon which they took refuge; and, upon assurance of civil trial and protection from violence, Minister Egan was instructed to require them to leave the legation. "You are not authorized to protect refugees against police officers for violation of laws." 33. Sept. 1, 1895, General Savasti, in command of the government forces of Ecuador, was defeated, and, sick and wounded, made his way to the American legation. Minister Tillman, during the month preceding, had refused all applications for asylum, but upon the overthrow of the government and the abandonment by the administration of the public offices, his legation became full of men, women, and children, while the defeated general also found a refuge therein. His entire course was approved by Secretary Olney. He considered that the shelter given was not in the nature of an asylum; that when there is no government it is proper to protect lives from violence, but that upon the reestablishment of a central government it is no longer justifiable to afford refuge to those whom that government demands. "Asylum can find excuse only when tacitly invited and consented to." 34. On Feb. 3, 1896, Minister Smythe sent the following message: "Protection asked by a political suspect denounced by the government. To-day I ask the 'usual courtesy' to place him on some outgoing vessel." This was answered February 18th by Mr. Olney in the following caustic manner:—

"No right to protect such persons by harboring them or withdrawing them from the territorial jurisdiction of their sovereign is or can be claimed on behalf of the diplomatic agents of this government. . . . Your request for the 'usual courtesy' is not understood. . . . If the Haytien government should exercise its evident right to refuse you such permission, you would be placed in a wholly indefensible position. The 'usual courtesy' of which you speak appears to be only another name for the practice of that form of alien protection . . . which this government condemns. Whatever the result of your request, notify the refugee that you can no longer extend to him your personal hospitality."

35. The American legation in Ecuador in March, 1896, occupied but a part of a certain building,—the upper floors. One Colonel Hidalgo was concealed in the rear of the building, but outside of the part occupied by the minister. Finding that he could not escape, he requested Minister Tillman to tender his surrender upon promises of kind treatment and a fair trial. Mr. Olney said :—

“You are responsible only for such part of your premises as you may actually rent and occupy, and, while you will neither invite nor tolerate abuse of your individual habitation as a refuge for evil-doers or suspects, you cannot permit any inference that you are to be regarded as accountable with respect to the other part of the building.”

This statement following, as well as a repetition of the language used in 23, *supra*, was allowed by Secretary Olney to pass without comment :—

“Under international law, the legations are regarded as asylums for persons pursued by mob violence, but not for conspirators when they may be demanded by regular proceedings from proper officials.”

#### PRINCIPLES INVOLVED.

From a legal standpoint alone, omitting for the present all questions of humanity and of practical policy, there are two grounds upon which the practice of asylum has been sought to be justified : I. Exterritoriality. II. Acquiescence and Usage.

##### I.

Secretary Bayard touches the heart of the whole matter when, in his letter of 1885, to Minister Scruggs, of Colombia, he states that the whole question of asylum has been much obscured by treating as a matter of fact a mere figure of speech.

From the earliest times it has been considered necessary to grant to an ambassador residing in a foreign state certain legal immunities. Accordingly he has been exempt from the operation of the local law as respects his person, his family, his suite, and, for the most part, as to his residence—this upon the two grounds of courtesy and convenience. To embrace within one general phrase the whole circle of his immunities, as well as to include the right contended for him of judicial control over his premises, and to emphasize the nationality of his children born while abroad, the term “extritoriality” came into use. By this figure of speech the idea became implanted that, although the minister selected his

domicile within foreign territory, yet by that selection his residence lost its former character and came *pro tempore* under the control of his sovereign as part of his territory. That this view involved but an imperfect conception of the true principles, and unwarrantably limited the idea of sovereignty of the accredited state over its own dominions, is to-day admitted, but with this comprehensive figure of speech taken as a basis, and accepted as a fact, it followed as a logical sequence that the minister's house could not be invaded by the government upon any pretext, any more than could the capital of the state from which he was sent. Consequently, if any one escaped to the asylum of the legation, it lay within the power of the ambassador, doing justice according to his own peculiar views, to say whether or not as a matter of courtesy (the courtesy thus became transferred to the wrong side of the account) he would surrender the refugee to the government from which he was fleeing, but he would admit of no right lying in the local government to demand the fugitive. The man was within the territory of a foreign power, over which the local jurisdiction, *a priori*, could not extend; and although the extreme absurdity of extradition was probably never claimed, yet, in some of the negotiations carried on between the countries from time to time involved, striking analogies to this process are to be found. This is the doctrine of asylum developed to its extreme limits.

Evidence of the presence of this idea in our diplomatic correspondence may be found in cases 3, 8 (wherein the French minister, M. de Lesseps, said that it was necessary "before all things to save the principles of inviolability and extraterritoriality"), 9, 19, 24, 28, 29, *supra*. In only one, *i. e.* 24, of these instances did it meet with the express disavowal of our government, although it is impossible, upon reading through our diplomatic correspondence in its entirety, to believe that the United States government sanctions, or ever has sanctioned, or even recognizes, the doctrine of extraterritoriality as thus applied. Our government holds that its ministers, their families, their suites, their servants, and their residences, are to be accorded all the rights of personal immunity that have been granted diplomatic representatives at all times, so far as may be necessary to their comfort and convenience, but this is a far different thing from saying that this immunity stretches to such an extent as to allow a minister to set up in the midst of another nation an independent sovereignty of his own which cannot be entered save by an unfriendly act. He may well be granted the privilege of seeing that justice is done upon those members of his

household, who by their official relation stand upon a similar basis with himself,—he may insist upon the prerogative of redress among them, perhaps; but this, too, is a far different thing from saying that a citizen of another country may, by simply passing the portals of his door, place himself in the same position as the *bona fide* members of his suite. Besides, good faith would seem to require that his household be kept above suspicion, and that it should at all times be open to the view of the accredited state; his tenure there is dependent upon the will of the sovereign to whom he is sent, and his rights rest, therefore, upon that sovereign's courtesy, not upon some quasi-temporary soil ownership. Personal immunity is too small a cloak to stretch over as a defence to shield from the operation of a local law a citizen of the country granting him this immunity. Simply stated, the idea is too broad; it takes too much as proved; the territory of the legation is not the territory of the legation-nation.

## II.

Premising, then, that there is no legal basis from principle to justify the doctrine of asylum, we come to consider the question of acquiescence and usage as affecting its practice. Thus: Minister Bassett speaks of the existence of the custom for seventy years in Hayti (case 19, 1875). The Minister of Brazil (case 7) states that the "right had been officially recognized and constantly respected by all the governments in Peru since its independence."

The usage seems to have grown up entirely in recognition of the instability of the various governments of the smaller American countries and the ardent vengeance with which each political suspect or revolutionist was hunted out when his faction was defeated. Some writer calls Peru "that classic country of revolution," and Mr. Seward speaks of the "chronic condition of rebellion" throughout Spanish America. In such a state of affairs it was no wonder that each ephemeral president and his cabinet felt a personal interest in maintaining a custom to the existence of which he might owe his life on the morrow. It was but natural that men should wish to preserve a retreat for themselves in such kaleidoscopic countries, where the conspirators of Monday might form the government of Tuesday, and the statesmen of the morning might be but outlaws in the afternoon. Thus we find (case 19) Minister Bassett stating: "The right of asylum has never been renounced by this government (Hayti), and it practically has refused to assent to its discontinuance. . . . The Haytien plenipotentiary would not agree

to having the exercise of this right taken away from even our consulates in the inferior ports." True, each government that happened to be in power for the time being would demand that any fugitives then in shelter should be surrendered, but it preferred always to predicate its request upon some ground which still recognized the existence of the custom, but contended that the present case was without the pale of its proper exercise.<sup>1</sup>

Thus it is that to-day, so far as now appears, there is but the one country of South America in which the custom is not recognized, *i. e.* Peru (case 8), while Great Britain has discarded the privilege with reference to its consular offices in Hayti.<sup>2</sup> The United States, "while discountenancing the custom, is indisposed to deny temporary shelter to any unfortunates threatened with mob violence"—an indisposition broad enough to protect almost any fugitive that may apply when fleeing as a political refugee.

Apart from questions of humanity, the chief basis of our attitude has been that this government wishes no "invidious distinction to be made against its ministers." (Case 29.) So Secretary Seward, May 1, 1868, "nor relinquished any sooner, nor in any greater degree than it is renounced by the legations of the other important neutral powers." Although Mr. Fish says inconsistently (in case 19), "The course of other states in receiving political refugees is not sufficient to sanction a similar step for us." And a few days later he blows cold again by saying, "We would prefer, therefore, not to formally assent . . . without ascertaining the views of other governments" <sup>3</sup>

We thus reach a conclusion that, owing to the long continuance of the custom and the acquiescence therein of the local governments, the nations of the world in general and the United States in particular, notwithstanding its qualified denunciation, while disavowing the usage in legal theory, will claim under certain conditions the quasi-right of being accorded the same privileges of asylum as have hitherto been granted in Central and South America. And until an express renunciation by the particular state in question, as by Peru in 1867, or a general agreement among the powers to cease the practice, the question is liable to repeatedly reappear in diplomatic correspondence.

Just what are those conditions under which the United States will again claim protection for refugees, and what the attitude of

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<sup>1</sup> As in cases 7, 19, 29, 32, and 35.

<sup>2</sup> *Cf.* Foreign Relations Reports, 1875, p. 682.

<sup>3</sup> Fish to Preston, case 19.

the government has been in the past, will more clearly appear by re-subdividing the cases cited into groups classified by some similar circumstances, and by first viewing the subject generally in the negative light of certain

#### LIMITATIONS.

In earlier times, the reverse of the present position was held in reference to the question, "Who may rightly seek the privilege of asylum?" Martens, in 1789,<sup>1</sup> declared that asylum was allowed for private crimes, but not for political refugees if their surrender were demanded. Vattel considered that it might be allowed to those who "often prove to be unfortunate rather than criminal," a status so difficult of ascertainment in the heat of the circumstances attending the request for asylum as to mean little unless it means political offenders. At any rate, to-day the privilege is confined to political refugees, and our state department entirely disavows any protection afforded to mere criminals.<sup>2</sup> . . . Just who are "criminals," however, and hence should be surrendered, has been a difficult nut to crack, and has been a matter of contention in some of the important cases (as in 9, 19, and 32). The government has apparently construed the question leniently, and has usually given the benefit of the doubt to the refugee, if the popular passion seemed great or the country in a general uproar. Such things have been left to the discretion of the minister upon the scene, who better could judge of the temper of the people and the real reason back of the demand for the fugitive; in all save (case 32) Minister Egan's second imbroglio. One can see in this latter decision a concession given to Chili to smooth the ruffled feathers of 1891. In this case the department seemed over-anxious to make the offenders out as criminals rather than outwitted politicians. They were indicted for "sedition, riot, insurrection, and mutiny." If this is a criminal charge it is rather equivocal, and has all the look of a mere political indictment.

The fact that a prior trial has been had and a conviction obtained for political wrong-doing before the refuge has been sought should be a reason for the surrender of the fugitive, since the custom has arisen mainly for that temporary protection until passion should subside and a fair hearing be granted. If that trial has been already had there seems no reason why this desideratum is

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<sup>1</sup> Polson, *Law of Nations*, sec. 32.

<sup>2</sup> See cases 7, 9, 17, 18, 19, 20, 23, and 32.



not already obtained. That a mere indictment had been had for prior criminal acts, although the refugees had been guilty of subsequent political offences, was considered sufficient reason for the surrender of the Chilian fugitives in case 32.<sup>1</sup> Quite different is the trial "par contumace" while the refugee is still under the legation roof, which appears in the extended reports of case 19. Mr. Moore<sup>2</sup> contends that such a proceeding is entirely warrantable, but in view of the fact that it is easily liable to abuse, the suspicion with which Minister Bassett looked upon the same doubtless justified our government in its refusal to surrender the refugees, upon the ground of their being proved enemies in a trial where they were not present to defend.<sup>3</sup>

An obvious limitation is that the right is confined to the premises of the legation itself. Boisrond Canal took refuge in the country home of Mr. Bassett, but since the minister was then occupying it as his personal residence, no question was raised. The continual annoyance in ceaseless shouting and the interruption of free passage which Mr. Bassett here suffered, as also Mr. Egan, in case 29, were unjustified, although they did take place beyond the bounds of the legation, in the streets and roads surrounding it. We were doubtless justified, despite Mr. Matta's reasoning, in treating these acts as wanton insults. As Mr. Egan tersely put it: "It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison." An unjustified use of his personal immunity was made by the Argentine minister in Colombia in 1885, in removing his effects to the home of the person sought to be arrested, and there protecting him. A legation can scarcely be the ambulatory thing he sought to make it. The Hidalgo matter in 1896 (35) shows the narrowness with which it is proper to construe the limits of the legation.

A considerable amount of the irritation in the two principal cases, 19 and 29, was caused by the belief of the local governments that the refugees were communicating with their partisans, and that the legation was thus but the centre and fountain-head of the opposing propaganda. There seems to have been no real ground for that belief in the Haytien matter, and little room for the same in the Chilian controversy, in view of the fact that several hundred police constantly patrolled the legation premises.

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<sup>1</sup> See, also, case 29, *semble*, as a reason for refusing safe-conducts.

<sup>2</sup> 7 P. S. Q. p. 229.

<sup>3</sup> Cf. also, Foreign Relations Reports, 1891.

So, also, it was claimed by the Haytien government that the refugees retained arms and ammunition in their possession, an allegation flatly denied by our minister, who stated the position of our government to be that it "would never tolerate any act of a hostile nature on the part of any refugee within the legation, while it is absurd to suppose that the official residence of the minister of a friendly foreign power is to be made an arsenal for the storing of arms and ammunition, or become the basis of operations against the existing government."

Another limitation ordinarily found in the granting of the privilege is that the minister furnishes upon request a list of the refugees. Such was the case in 9, 17, and 21. Minister Bassett's refusal in 1875 to do so seems entirely satisfactory, for the true basis for furnishing the list seems to be the one he gives, *i. e.* to facilitate the embarkation of the refugees. The granting of the list appears to be a manifest courtesy, but not a requisite, save in making out safe-conducts and in preparations for departure.

Having seen that both writers upon international law and governments at large discountenance any legal theory of asylum, and maintain it only in a certain limited sphere, upon limited conditions, and predicate their attitude then only upon past usage, we now look to see whether or not the policy of continuing the practice be not, like the theories that gave it birth, entirely fallacious.

"The practice of giving asylum has been and still is a prolific source of revolutions in and the instability of South American republics. The traitor feels assured that if he fails in his rebellion he has only to flee to the house of the minister, where he is protected with tender solicitude. Thus encouraged, he launches recklessly into his schemes, and the country is kept in continual commotion." (Minister Hovey, Peru, 1866.) "One of the greatest difficulties which a foreign minister has to meet here grows out of the mistaken notion that legations are 'cities of refuge' where every class of law-breakers is safe from arrest. So general is the misunderstanding that a thief or a deserter or an assassin considers himself safe if he can secure admission by force or fraud into a building occupied by a foreign minister." (Minister Tillman, Ecuador, 1896.)

These quotations show clearly the abuse to which the practice is liable and which seems its necessary adjunct, and, in confirmation thereof, may be stated again the cases of Boisrond Canal, three times a refugee, who returned as president three weeks after his embarkation from our legation, and those of Canseco in Peru and Granadas in Guatemala, each of whom owed his quickly subsequent

presidency to his timely American shelter. Every fact that appears in the reports bears out the statements cited above, and though the question is a complex one, it may well be doubted if the humanity which prompts the shelter of refugees is in the long run humanity at all, but is not rather the cause more than the subsequent of the turmoil of the Spanish states. It is scarcely to be denied that "the practice tends to the encouragement of offences for which asylum may be desired." Add to this the expense and trouble entailed upon the ministers in granting the privilege, and the constant irritation engendered whenever its exercise is called into play, and we may well question whether stability will not be fostered and justice better secured by leaving the states in question to work out their own salvation in their own way; to apply to the Spanish American states what a great writer on international law, Merlin, has stated in general: "What, then, is the proper way to end all disputes with regard to the right of asylum? It is to return to the general principle which we have laid down; it is to acknowledge positively that this so-called right is only an abuse, an outrage against the sovereign authority, and that no consideration should cause it to be tolerated;" or, as Phillimore has called it, "a monstrous and unnecessary abuse."

#### THE COURSE OF THE UNITED STATES GOVERNMENT.

While our government in several of its dispatches asserts that its course has been marked by consistency, it is warrantable to reach an opposite result by reading through its own utterances. While there runs through the instructions a certain similarity of phrase, yet we must conclude that the main end of the government has been to keep out of difficulties, and that it is impossible to tell in just what case a minister would be safe in granting the privilege, although he is yet not *forbidden* to do so by the tenor of his instructions. Nowhere is this more strikingly illustrated than in our attitude regarding *consular* protection. In cases 2, 4, 6 it was positively stated that no such usage existed, while in case 5 (six years previous to case 6) it was practically conceded that there was such a custom. In 1872 (case 14) cases 2, 4, and 6 were disregarded and 5 followed, and in the following year, case 15, the inference was that the department's wrath was roused not by the surrender of the fugitive, but by the violence of the entry. Case 21 inclines to the negative view of 6, and the department in its latest utterances, in 25 and 26, comes out unreservedly that legations and consulates stand on the same footing. How any claim

for consistency can be maintained in a record of this sort (no, no, yes, no, yes, no, no, yes, yes) is inconceivable.

It is only by dividing the cases into four groups that order can be found in the decisions made, although it is to be admitted that the general course has been to deprecate the practice.

### A.

#### CASES WHEREIN ASYLUM HAS BEEN REFUSED.<sup>1</sup>

In all of these instances save the last, the *Barrundia* episode, the government has unqualifiedly approved the action of the representatives of the United States in refusing asylum. The last-named case must stand upon precedent as a mistake of Mr. Blaine's, for it is the only case in the history of our diplomacy where a minister was censured after refusing shelter. Certain different questions of course arise, since the affair took place upon a vessel in harbor, but Mr. Blaine's whole argument is permeated with the view that "the abandonment of such a privilege" cannot be approved. He says nothing in regard to the discretion of the minister in such cases, which seems to be the keynote of the standing instruction to ministers as found in case 23. (For absolute contradiction *cf.* cases 28 and 34.)

### B.

#### CASES IN WHICH INSTRUCTIONS ARE ASKED AS TO FUTURE ASYLUM.

The real place to look for the policy of our government is in its instructions, based not upon a case then pending, but upon its directions for future guidance, since then the doctrine may be found untrammelled by any of the complications of an actual difficulty. The two earlier cases, 1, 6, are to the effect that asylum is improper if there be objection to its exercise. Then follows the long list of instances<sup>2</sup> which show the steady theoretical policy of the country (apart from the decision of actual cases) from 1868 to 1890. The meat of these instructions is that mentioned before (page 131):—

"While discountenancing the custom, the United States is indisposed from obvious motives of humanity to deny temporary shelter to any unfortunates threatened with mob violence."

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<sup>1</sup> These are cases 7, 8, 17, 18, 20, 30, 31, and 28.

<sup>2</sup> Cases 10, 11, 23, 24, 25, 26, 27.

The latest extended and crushing utterance on the subject, Mr. Olney's, case 34, can be reconciled with the foregoing by assuming that the state of public peace was tranquil at the time, *i. e.* that we are to put the emphasis on the word *mob* in the instructions quoted. He tells the minister that he has placed himself in an "entirely indefensible condition." Mr. Olney's savage rejoinder seems cruel when we find that one month later he tacitly recognizes the usage as existing in Ecuador.

## C.

We do not find unanimity in those cases wherein asylum has been granted, but slight difficulty has arisen, and the matter has been referred for comment. The general tendency has been in this situation to approve the action of the minister with instructions to "be more careful in the future," showing that we would prefer to be humane if we could do so without raising too much disturbance, but yet that we wish to keep ourselves free to disavow any act in the future or to justify a refusal to grant shelter.<sup>1</sup> There runs through these cases the general Christian idea of protection of life in times of passion and riot, or when the central government is paralyzed, the true limit of the "right." Of the cases 2, 4, 15, 21, 32, and 34, in which such granting of asylum was *condemned*, although the difficulty was but a minor one, 2, 4, 15, and 21 may be distinguished as being consular cases, in which the rule is now changed; 32, in that the government professed to be convinced that the men were criminals (this is the only instance in which men were actually turned out after having secured the asylum), and 34 upon the ground just pointed out.

## D.

The last division of cases, 19 and 29, deserves a separate classification only because of the great irritation under which they were decided. The matter of Boissard Canal has been sufficiently commented upon before, and one is disposed to side throughout with Minister Bassett, to feel gratified that our government did not consent to the surrender of the refugee, and to feel disappointed that it was willing to state to the Haytien envoy that "Mr. Bassett has thought proper to take the responsibility of harboring the persons referred to contrary to the wishes of his own government. This act has not been approved by this department, as it is not

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<sup>1</sup> These are cases 3, 5, 9, 12, 13, 14, 16, 22, 33, and 35.

sanctioned by public law, though it is in conformity with precedents in that quarter."<sup>1</sup> Again our department says, "Although . . . you should not have received those persons, it was not deemed expedient to comply with his request" to set them at large.<sup>2</sup> The only reason that Mr. Bassett's action was not disavowed entirely was the feeling that we must support our minister, in so inflamed a state of public mind, "for the honor of the flag." It is difficult to see how Mr. Bassett's position could have been any different under the instructions given to him subsequent to the imbroglio, had he received them in advance. His course was justifiable under the circumstances. Quite different was the government treatment of Mr. Egan in Chili in case 29. Although he went out of his way in affording opportunities for gratuitous insults and friction, and placed his arguments upon the untenable ground of extritoriality, yet he was sustained and soothed throughout. His one strong position, that of having afforded shelter to the adherents of the now dominant faction, gave him an additional strength with the state department, and while the exigencies of the situation possibly required that our government should act with a firm hand, it seems a matter of regret to the impartial observer that some of the strong language used upon Mr. Bassett could not have been exchanged for some of the considerateness shown Mr. Egan. The latter's statement that he had expended \$5000 in the entertainment of the Chilian fugitives sounds badly in an American ear.

#### HOW WILL ANY FUTURE DIFFICULTY BE DISPOSED OF?

Taking the strong denunciation of Mr. Olney as representing the present feeling, the following statements are possibly indicative of our future policy:—

(a) The United States refuses to recognize that there is any right of asylum by the law of nations.

(b) Yet, by long acquiescence and usage, in the countries of Spanish America, such a custom does exist.

(c) This government is unwilling, acting independently, to assent to its entire abolishment, but expects the same privileges, if demanded, that are accorded the other powers. However,—

(d) It believes that this custom, as practised in the past, is as bad in policy as it is erroneous in principle; that it tends to aggravate those conditions which called it into being; that it is subject

<sup>1</sup> Foreign Relations Reports, 1875, p. 739.

<sup>2</sup> *Ib.*, p. 701.

to great abuse, which is apparently inseparable from its existence ; and that —

(*e*) Its use must be limited to very narrow conditions within the careful discretion of the representative of this government,

(*f*) While a refusal to exercise the privilege will never be looked upon with disfavor.

(*g*) It can be granted *only* in case (1) there is mob violence threatened and imminent, or (2) when the existing government has been overthrown and the local law has given way to license and riot ;

(*h*) And it can never be invoked to harbor criminals and offenders against the laws when demanded by regular proceedings from proper officials.

(*i*) Whenever the protection is granted, all munitions of war must be confiscated ; the refugees must be kept within the limits of the legation premises ; and all communication with outside parties must be strictly prohibited.

This seems to be about as far as it is possible to curtail the "right," or perhaps, until the civilization of the South American countries is farther advanced, about as far as is expedient. Within these narrow limits, if they are strictly adhered to, humanity and wisdom seem to have joined hands, and with a consistent course predicated upon the above gleaned principles, the so-called right of asylum should not in the future be the cause of any serious difficulty, although it is doubtful if it will for many years disappear entirely from the yearly records of the Department of State.

*Barry Gilbert.*